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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

WILBURN BOAT COMPANY, ET AL., *Petitioner*

v.

FIREMAN'S FUND INSURANCE COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Wilburn Boat Company, respectfully shows:

OPINIONS BELOW

This case was tried three times in the Federal District Court at Sherman, Texas, and was considered three times by the Court of Appeals for the Fifth Circuit and once by this Court. Reported opinions are listed below.[1]

[1] Wilburn Boat Co. v. Fireman's Fund Ins. Co., 201 F.2d 833 (1953); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955); Fireman's Fund Ins. Co. v. Wilburn Boat Co., 259 F.2d 662 (1958); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 190 F. Supp. 784 (1960); Fireman's Fund Ins. Co. v. Wilburn Boat Co., —F.2d— (1962). The District Court's Memorandum Decision of October 1, 1957 is printed in the Court of Appeals Transcript of Record, Case No. 16,945, sent to this Court and made a part of Case No. 646, October Term 1958. All the Supreme Court opinions are likewise printed therein.

Appendix A is the majority opinion of this Court. Appendix B is the majority and dissenting opinions of the Court of Appeals. Appendix C is the District Court's 1960 findings of fact and conclusions of law.

JURISDICTION

The judgment of the Court of Appeals was entered March 23, 1962. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 *USC* 1254(1).

PRIOR PETITION OF APRIL 1953

The Court of Appeals' adherence to strict rules of admiralty insurance law, and its failure to apply appropriate Texas State law, raises the same issues previously ruled upon by this Court (Appendix A). Therefore, petitioner refers the Court to its previous Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit, No. 7, October Term 1952, which was granted on April 26, 1954.

QUESTIONS PRESENTED

1. Can outmoded and strict rules of marine insurance law, adopted by some early admiralty courts, supersede a subsequent Act of Congress directing that:

> "The business of insurance and every person engaged therein shall be subject to the laws of the several States which relate to the regulation or taxation of such business." (McCarran Act of 1945, 15 USC, Sec. 1011, 1012.)

and the 1955 Supreme Court decision in *Wilburn Boat Company v. Fireman's Fund Insurance Co.*, 348 U.S. 310

(Appendix A), so as to justify the refusal of the Court of Appeals to recognize the above Act of Congress and this Court's decision and fashion its own law and facts to support the forfeiture of a fire-marine insurance policy on the grounds of concealment and misrepresentation?

2. Are the strict rules of misrepresentation and concealment, referred to in some early federal admiralty decisions, so firmly entrenched in American Jurisprudence as to take precedence over State insurance codes and State Court decisions construing these codes and policy provisions in cases where fire and marine insurance policies are sold within the boundaries of a State to citizens of that State by a foreign corporation authorized to do business in that State?

3. Did the Supreme Court intend to limit its appropriate State law decision in this case (Appendix A), to strict rules of marine insurance warranties and exclude therefrom State insurance statutes and State court decisions regulating the forfeiture device of concealment and misrepresentation?

4. On conflicting evidence, can the Court of Appeals try a civil case *de novo* and disregard the fact findings of a trial Judge who saw and judged the credibility of witnesses, when the Federal Rules of Civil Procedure (Rule 52) and decisions of this Court forbid a Federal Appellate Court to do so and when Article 21.16 of the Texas Insurance Code provides that the issue of materiality is a "question of fact to be determined by the court or jury trying the case"?

5. Can a foreign insurance company authorized to do business in a state, violate insurance agency laws of that state and then defend litigation in a Federal Court on the grounds that a licensed insurance agent doing business in

that state was not their apparent or implied agent when the insurance company delivers the policy to and accepts premiums from the agent and conceals from the assured, prior to the loss, that the insurance agent was not authorized to act in their behalf? (Reserved for brief on the merits of the case.)

6. Can the sovereign right of a State, be impaired by Federal decisions relating to the forfeiture device of concealment and misrepresentation when Congress had declared that the continued regulation by the several States of the business of insurance is in the public interest and that silence on the part of Congress shall not be construed to impose any barrier to the regulation of such business by the several States?

7. Were the appropriate insurance laws of Texas accurately applied?

FEDERAL STATUTORY LAW INVOLVED

Title 15, United States Code, Sections 1011, 1012, *The McCarran Act of 1945.*

Sec. 1011—*Declaration of Policy*

"Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

Sec. 1012—*Regulation by State Law*

"Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948."

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

"(b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; * * *."

Title 28, United States Code, Section 1652 (1948), *State Laws As Rules of Decision.*

"The laws of the several States, except where the constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in all the Courts of the United States in cases where they apply."

APPLICABLE TEXAS STATUTORY LAW

(Printed in Appendix D)

CONCISE STATEMENT OF THE CASE

Federal jurisdiction in the first instance was acquired by diversity of citizenship and the amount involved.

The Court of Appeals declared a fire and marine insurance policy on the Motorboat WANDERER forfeited on the grounds that petitioner concealed and misrepresented material facts. In order to justify its decision, two Circuit Court Judges (one Judge dissenting) ruled that strict admiralty rules of concealment and misrepresentation are so firmly entrenched in American Jurisprudence that the power of the several States to regu-

late the forfeiture of boat insurance is nullified. The District Court's findings of fact, Appendix C, is adopted as petitioner's statement of the case, with certain exceptions and reservations which need not be discussed at this time.

Contrary to the statement in the Court of Appeals' opinion, petitioners do not concede or admit that they breached three warranties or that representations mentioned were false or untrue or were fraudulently made, or were intentionally made to deceive respondent or were relied upon by the insurance company. The fact findings of the trial court support petitioner's position in this regard.

The Court of Appeals ruling that the policy was forfeited because the "intended use" of the WANDERER was concealed is neither supported in fact or in law. It was not the intent of the parties to insure "intended use" because the policy itself clearly excludes "intended use" by limiting the coverage to pleasure use. Future use was contingent upon the successful accomplishment of the items listed in the trial court's fact findings. The warranty of use and not the alleged concealed "intended use" governed the rights of the parties. Intended use was not material to the risk according to the Texas definition found in *Indiana and Ohio Livestock Ins. Co. v. Smith*, 157 S.W. 755, 756, relied upon by the Court of Appeals.

The majority opinion of the Court of Appeals overlooks the undisputed fact that *prior to the loss, petitioner advised the respondent in writing that the WANDERER is used for commercial purposes.* (R. 668) The WANDERER burned while she was laid up and not in use. The use of the vessel, intended or otherwise, did not contribute to the fire loss.

The lower court found that there was no fraud. The Court of Appeals refused to disturb this finding. Therefore, even if "intended use" was material and was concealed, nevertheless, the policy could not be forfeited under Texas law because the essential element of fraud was not established. *Hanover Fire Ins. Co. v. Nash* (Tex. Civ. App., 1934), 67 S.W. 2d 452, 454 (Error Refused).

The majority opinion lays great stress on the location of the vessel at the time of the fire, but fails to mention the fact that the vessel burned at a location selected and approved by the insurance company in writing. (R. 120-122).

The Court of Appeals concedes that some of the five constituent elements of misrepresentation, required by Texas decisions, were not proven in the case at bar. *American National Life Ins. Co. v. Martinez*, 149 S.W. 2d 637, 640, 641 (Dismissed, Judgment Correct). For example, it is admitted that respondent did not rely on any representation made by petitioners until after the loss. The Court of Appeals does not refute the fact that there was no intent to deceive the insurance company or that the alleged representations did not induce respondent to assume the risk. Subsequent statements made by the assured in good faith cannot avoid a policy contracted for in Texas.[2]

The Court of Appeals reference to the Florida case of *Chaachou v. American Central Ins. Co.*, 241 F. 2d 889 (5 CA), is inappropriate. The Court of Appeals so held in *Vernon v. Aetna Ins. Co.* (Appendix E). The Florida case involves false swearing and fraud *after* loss. There is no false swearing or fraud in the case at bar.

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2 **Aetna Accident & Liability Co. v. White** (Tex Civ App 1915) 177 S.W. 162, 166 (Error Refused).

When an insurance company sells an "agreed value" policy, statements pertaining to value are not a sufficient representation to declare a policy forfeited, unless there is positive proof of fraud. No fraud was proven. This is the Texas law and the admiralty rule of law.[3]

REASONS FOR GRANTING THE WRIT

1. *Real Conflict With This Court's Applicable Decisions*

This case involves a conflict of opinion on Federal admiralty law questions and the power of the several States to regulate insurance business conducted within the territorial limits of the respective States. Congress and this Court in this case granted to the States the right to regulate the terms and conditions of a fire and marine insurance policy. The majority opinion of the Court of Appeals has taken away this right insofar as the defense of concealment and misrepresentation is concerned.

The resolution of the conflicting opinions of both Federal and State Courts have an immediate importance far beyond the particular facts and parties to this protracted litigation. The rights of millions of small boat owners in every State of the Union are directly involved when a Federal Court places itself in a position where the appropriate insurance laws of a State can be disregarded.

The logic and reasoning supporting the majority opinion of the Court of Appeals is not in accord with the principles of law adopted by this Court in its opinion in this case (Appendix A), or by the Court of Appeals for the Fifth

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3 **Bull Dog Auto Ins. v. Crowley** (Tex.Civ.App., 1926), 281 S.W. 622, 623; **Delaware Ins. Co. v. Hill** (Tex.Civ.App., 1910), 127 S.W. 283, 292 (Writ of Error Refused); **Aetna v. United Fruit Co.**, 304 U.S. 430, 434 (1938); **Alsop v. Commercial Ins. Co.**, Fed. Cas. No. 262, pp. 570, 571 (1833).

Circuit in *Vernon v. Aetna Ins. Co.*, No. 18,840 decided March 30, 1962 (Appendix E). If this Court's decision in this case is to be restricted in the manner adopted by the Fifth Circuit Court then we will have confused and inconsistent judicial statements of insurance law, including the right of a State to regulate the business of insurance conducted within its boundaries.[4]

It is significant that the strict admiralty rule adopted by the majority opinion of the Court of Appeals is derived from an early common law rule established in the non-maritime case of *Carter v. Boehm*, 97 Eng. Rep. 1162, 3 Burrows 1905 (1766). A more liberal rule is expressed in *Clark v. Insurance Co.*, 8 How 235, 249, 12 L.Ed. 1061, 1066, 1067 (1850):

> "We think that the governing test on it must be this: it must be presumed that the insurer has in person or by agent in such case obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume nothing on the risk is desired of him. . . . When representations are not asked or given . . . and the insurer chooses to assume the risk, he must in point of law be deemed to do so at his peril."

A uniform application of the rule stated by this Court in this case and the *Clark* case and *American Central Ins. Co. v. Nunn* (Tex. Civ. App., 1904) 79 S.W. 88, 89 (Writ Refused), is essential to the proper functioning of

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4 **Hooper v. California**, 155 U.S. 648, 655, 656 (1895) and **Nutting v. Massachusetts**, 183 U.S. 553, 556 (1902). For comments on the scope of the Wilburn decision, see **A/S J. Ludwig Mowinckels Rederi v. Commercial Stevedoring Co.**, 256 F.2d 227, 229-231 (2 CA-1958).

the insurance business in the United States and Texas. The right of an assured to recover fire and marine insurance losses must be certain. It cannot be speculative or be involved in confusion predicated upon whether State laws or Federal decisions govern the rights of the parties. Once the certainty of recovering an insurance loss is thrown in doubt by federal courts, the basic reason for buying and selling insurance is diminished or extinguished.

2. *Conflict With The Other Fifth Circuit Court Opinions*

Judge Brown, in the 1958 opinion of the Fifth Circuit Court of Appeals, 259 F. 2d 662, held that the asserted defenses of mortgage, change of title and commercial use might properly be held, under Texas law, as not constituting a defense.[5]

One week after the Fifth Circuit Court of Appeals reversed the trial court in this case the same court rejected the legal reasoning and principles of law therein stated. See *Vernon v. Aetna Insurance Co.*, No. 18,840, dated March 30, 1962, not reported to date. The majority opinion in the *Vernon* case is printed in Appendix E. The same Texas misrepresentation statute and the same policy "escape clause" is considered. The fact situation, however, is dif-

[5] The Court of Appeals nevertheless reversed and remanded this case to the District Court because the proof on the vital point of whether *respondent was doing business in Texas* did not satisfy the Court of Appeals. At the third trial, petitioner proved that in 1948, the net premiums collected by respondent in Texas amounted to $2,239,295.00 and the net losses incurred were $567,298.00, leaving a gross profit on Texas business of $1,672,098.00. For twelve years respondent concealed from federal courts the vital information that respondent was doing business in Texas and thereby secured a third trial.

ferent in that the *Vernon* case involves fraud and false swearing as distinguished from unintentional statements of immaterial facts. The conflicting views expressed in these two opinions leaves the final disposition of Texas insurance litigation in Federal Courts upon the "luck of the draw."

3. *Conflict With Texas Decisions*

There is a direct and real conflict between the Court of Appeals and Texas appellate courts regarding the defense of concealment and misrepresentation. For example, the Court of Appeals relies on *Indiana and Ohio Livestock Ins. Co. v. Smith* (Tex. Civ. App., 1913), 157 S.W. 755 (Writ of Error Refused), to define "material to the risk", as that term is used in Texas. The Court of Appeals used a definition taken from an early New Hampshire case cited in the Texas decision but rejected the Texas definition of material to the risk, which reads as follows:

> "The expression 'material to the risk' is not equivalent to 'increasing the risk' but necessarily means the making of some representation or misstatement of some fact which induces or causes the insurance company to assume the risk; and if, * * * it is shown that there were misrepresentations of fact, and these facts not only induced appellant to write the contract *but also shows that it wholly relied upon the truth of these statements in entering the contract* and that they were material inducements thereto, the same must be regarded as being embraced within and covered by said statute (now Article 21.16, Texas Ins. Code)." (Emphasis supplied)

The Court of Appeals flatly refuses to follow the latest Texas decision on the construction of Article 21.16, *Texas*

Insurance Code. See *Trinity Reserve Life Ins. Co. v. Hicks* (Tex. Civ. App. 1956) 297 S.W. 2d 345, 349 ~~(Writ Refused)~~. The cases relied upon by the Court of Appeals do not raise the issue of whether materiality and contribution to the risk must be proven by an insurance company to establish the defense of misrepresentation. The *Trinity Reserve Life Insurance Co.* case requires proof of both elements.

The Court of Appeals' decision overlooked or failed to recognize the Texas rule which requires an insurance company to prove five constituent elements of misrepresentation before a policy can be declared forfeited. They are: 1. Making the representation. 2. Falsity thereof. 3. Reliance thereon. 4. Intent to deceive. 5. Materiality thereof.[6]

The Court of Appeals overlooked Texas decisions relied upon by the District Court to support its decision overruling the defense of concealment, such as, *Hanover Fire Ins. Co. v. Nash* (Tex. Civ. App., 1934), 67 S.W. 2d 452, 454 (Writ of Error Refused). In that case, the Court said:

> "Concealment must, in the absence of inquiries, be not only material, but fraudulent or the fact must be intentionally withheld."

Respondent admits that their underwriter did not rely upon any of the alleged *misrepresentations* listed by the

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[6] **Roosth v. Lincoln National Life Ins. Co.**, 269 F.2d 171, 178 (5 CA-1959), cert. den. 361 U.S. 917 (1959); **American National Life Ins. Co. v. Martinez** (Tex.Civ.App., 1941), 149 S.W.2d 637, 640, 641 (Dismissed, Judgment Correct); **Pioneer American Ins. Co. v. Meeker** (Tex.Civ.App. 1957), 300 S.W.2d 212 (reh. Den., error refused, no reversible error). The trial court followed these decisions, the majority opinion of the Court of Appeals did not

Court of Appeals. (R. 588). Petitioner's statements in the application blank sent to the assured six months after the risk was accepted were filed away and not examined until after the WANDERER burned. Alleged misrepresented facts did not influence respondent to insure the WANDERER or retain insurance coverage.

In Texas, it is not in the public interest to permit insurance companies to use an application blank promiscuously so as to induce the unwary public to make written statements therein after the risk and premiums are accepted and thereby give insurance companies an opportunity to second guess a risk they assume.

The Court of Appeals overlooked or failed to recognize Article 21.35 of the Texas Insurance Code and various Texas decisions which require every policy of insurance contracted for in Texas to be accompanied by a copy of the application blank and statements made thereon. This requirement is mandatory. If an insurance company fails to comply with this statute the written statements made by the assured cannot be used as evidence to support the defense of misrepresentation.[7] Petitioners were not given a copy of their statements and they were not attached to the policy.

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[7] **American Indemnity Co. v. Baldwin Motor Co.** (Tex Civ App. 1927), 19 S.W.2d 848, 849, and **Southwestern Surety Co. v. Hico Oil Mill.** (Tex Com App., 1921), 229 S.W. 179, 181, 182 where *the Court said:*

> "The purpose of the Legislature, as declared in the title, was to provide conditions upon which a defense might be made to a suit on a contract of insurance on the ground of misrepresentations made in the application or in the contract * * *. It was evidently in the mind of the Legislature that, inasmuch as the misrepresentations prescribed were made available in defense to the insurer, the insured should be provided with a copy thereof on the issuance of his policy."

The facts misrepresented in the Texas decisions relied upon by the Court of Appeals were made in an application blank attached to the policy, or were taken from declarations made in the policy itself, prior to the risk being accepted by the insurance company and were in full compliance with Article 21.35, *Texas Insurance Code*. These cases are therefore distinguishable on the facts. Moreover, in the *Fullen* case the property was encumbered be-

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"Prior to the enactment of the amendment, it was permissible for insurance companies to make representations not contained in the policy or accompanying it. * * *. Such representations could be retained exclusively by the company issuing the policy. The insured persons, on receipt of their policies unaccompanied by such instruments and statements, might fail to correct errors therein that otherwise would be corrected. In consequence of misrepresentations—whether for lack of opportunity on the part of the insured, or for other reasons—policy obligations were avoided through defenses based thereon * * *."

"The legislature, as part of its plan to provide conditions on which misrepresentation could be interposed as a defense to suits on insurance policies, and to remove some of the harshness of the law as it then existed as affecting policyholders, required that the copies specified in Article 4951 (now 21.35) should accompany the policy issued. In view of the fact that injury could result to the policyholder as a result of noncompliance with such conditions on the part of the insurer, the requirement was doubtless intended to be mandatory. If the mandate of the statute can be disregarded with impunity, and the insured be injured thereby, he does not receive the full protection the Legislature intended to accord him. The penalty for noncompliance follows in the consequence of the mandatory character of the provision, and is, in this instance, that the company, having failed to accompany the bond sued on with a copy of the questions asked Benicni (the policyholder) and his answers given thereto, cannot prove its defense by misrepresentations made therein."

Franklin Fire Ins. Co. v. Fullen (Tex Civ App, 1940), 139 S W 2d 376; **Inter-Ocean Ins. Co. v. Ross** (Tex Civ App, 1958), 315 S W 2d 71

fore the risk was accepted. In the *Wilburn* case the boat was encumbered after the risk was assumed. Under Texas law this could not void the policy (Article 5.37, Texas Ins. Code).

It is significant that the Court of Appeals' quotation from 24B *Texas Jurisprudence* 391, to the effect that Texas Courts are inclined to adopt the strict admiralty rule of misrepresentation, is now eliminated from the latest publication of this work. See 32 *Texas Jurisprudence Second* (1962). The author no doubt carefully analyzed this Court's opinion in the *Wilburn* case (Appendix A) and concluded that the strict admiralty rules of concealment and misrepresentation are not applicable to Texas fire and marine insurance policies.

4. Trial de novo Procedure

The Court of Appeals departed from the accepted and usual course of judicial proceedings by trying this case *de novo* and ruling that the findings of fact of the trial court were clearly erroneous. Such conclusion is unsupportable when testimony is conflicting and reasonable men differ as to inferences to be drawn from the evidence. See Rule 52 of the *Federal Rules of Civil Procedure* and the mandatory statutory provision in Article 21.16 of the *Texas Insurance Code* which clearly states that the issue of materiality is a question of fact to be determined by the Court trying the case.

CONCLUSION

For the reasons stated above, judgment of the Court of Appeals for the Fifth Circuit should be summarily reversed

and the District Court's decision affirmed. In the alternative, Petitioner respectfully submits that a writ of certiorari should issue herein to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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